

Protests of) Date: October 14, 1992
)
 LOBAR, INC./MARROQUIN, INC.)
 BENCHMARK/HERCULES LIMITED)
)
) P.S. Protest Nos. 92-49;
 Solicitation No. 419980-92-A-0018) 92-53^{*****}

DECISION

Benchmark/Hercules Limited and Lobar, Inc./Marroquin, Inc., each protests the contracting officer's determination of its non-responsibility for a construction project in York, PA. Each alleges that the contracting officer improperly evaluated its offer and awarded the contract to a higher-priced proposal.

On March 9, 1992, the Philadelphia Facilities Service Center issued Request For Proposals (RFP) No. 419980-92-A-0018 for construction of a Delivery Distribution Center at the East York Branch, York, PA. An Advance Notice to Offerors which preceded the RFP reserved competition for the project to joint ventures containing at least one minority partner and provided that "the minimum financial and operational participation of the minority-owned business" was to be thirty percent.

The solicitation stated that award would be made to the responsible joint venture offering the "most advantageous" proposal. Section M.1 a., Contract Award And Proposal Evaluation, listed two primary factors for determining the most advantageous proposal:

- (1) Price and price-related factors;
- (2) If this solicitation results in a contract for more than \$500,000, the otherwise successful offeror must have an acceptable Small, Minority-Owned and Woman-Owned Subcontracting Plan. . . .

M.1 b. stated that "[c]ost/price will be considered in the award decision, although the

award may not necessarily be made to that offeror submitting the lowest price."

Section M.1 c. listed specific areas of information which each offeror was requested to provide in order to evaluate the responsibility of the joint venture:

- (1) Previous experience of the contractors as a joint venture and as participants in other joint ventures (if applicable);]
- (2) Financial Statement (within last 12 months);
- (3) List of ten (10) largest completed projects within the last two years, including any U.S. Postal Service or other Government Agency projects, which reference mechanization experience as required by the solicitation. Provide client/owner's name, address, telephone number, name of person to contact, contract amount and contract number (if applicable);
- (4) Provide a list of current active projects, include client/owner's name, address, telephone number, name of person to contact, contract amount and contract number (if applicable);
- (5) Actual work to be performed by the joint venture, excluding subcontractors; and
- (6) A cost breakdown of your lump sum proposal in sufficient detail to permit evaluation by major disciplines.

Sixteen offers were received in response to the solicitation; these were opened and reviewed on April 21. The evaluation committee determined that the offerors submitting the three lowest-priced offers, including Benchmark/Hercules and Lobar/ Marroquin, were nonresponsive because the minority partner of each did not "present comparable work experience, as required in the RFP."^{1/} Accordingly, the contracting officer issued Notice of Award to the fourth-lowest offeror, Keating/McCrae, Joint Venture, by letter dated June 15. On that same date, the contracting officer informed all other offerors that they had not been selected. These two timely protests followed.

Lobar/Marroquin's Protest

In its protest (No. 91-49), Lobar/ claims that nothing in the solicitation requires the minority joint venturer to demonstrate comparable work experience. In any event, the protester asserts that Marroquin has a "distinguished" performance record; several references from former Marroquin clients attesting to the contractor's quality work were

^{1/} Lobar/Marroquin's proposal was the third lowest-priced offer received by the contracting officer. Benchmark/Hercules' proposal was the lowest-priced offer.

attached to the protest. Lobar/Marroquin also challenges the award to Keating/McCrae, contending that its proposal fails to meet the solicitation requirements, noting that the initial proposal contained an inadequate minority subcontracting plan, and that the Keating/McCrae joint venture agreement is incomplete, "cast[ing] doubt on the true nature of the Keating/McCrae joint venture relationship."

A second letter to this office, dated July 14, objects to the Postal Service's continuation of the project in question while its protest is pending,^{1/} and criticizes the behavior and attitude of contracting officials in responding to a congressional inquiry about the solicitation, and in conducting a debriefing requested by the protester. Lobar/Marroquin alleges that a postal debriefing official admitted that "mistakes were made" in the evaluation process and requests an opportunity to review Keating/McCrae's offer package and other relevant solicitation documentation.^{1/}

Benchmark/Hercules' Protest

In its protest (No. 92-53), Benchmark/Hercules claims the contracting officer confused the determination of responsibility and the evaluation of offers to determine the "most advantageous" proposal in concluding that Benchmark/Hercules was nonresponsible. The protester alleges that the contracting officer inappropriately compared the work experience of the various offerors in determining Benchmark/Hercules' responsibility, rather than determining its ability to meet the minimum solicitation requirements. Benchmark/Hercules argues that, although comparing the strengths and weaknesses of one joint venture to another is appropriate in determining the most advantageous proposal,

once it has been determined that a particular proposal is most advantageous, the determination as to whether that joint venture is responsible should be limited to whether the joint venture meets the minimum stated requirements. The solicitation does not disclose to offerors that a comparative analysis of experience will be employed to determine responsibility. It is clear that the contracting officer made such a comparative analysis. . . . [T]he contracting officer has blurred the distinction between responsibility determinations and an evaluation of the factors for award

The protester further claims that its proposal indicated the ability of both Benchmark

^{2/} It is the contracting officer, not this office, who determines whether contract performance should continue when a post-award protest has been filed. See Procurement Manual (PM) 4.5.5 b. Therefore, we do not address this portion of Lobar/Marroquin's protest in our decision.

^{3/} Two additional letters from the protester were received, dated July 17 and July 24, which criticize the timeliness of the contracting officer's report and reiterate Lobar/Marroquin's request to review all relevant evaluation documentation.

and Hercules to perform the contract. Benchmark/Hercules accuses the contracting officer of giving more experienced minority contractors a "perpetual advantage" by rating them more highly than less experienced minority contractors. The protester asserts that this action runs contrary to the purpose of a minority contractor-related solicitation program.

Benchmark/Hercules also questions the responsibility of the successful offeror, Keating/McCrae, claiming that Keating/McCrae's minority partner has not been "certified" by a state services directory in Pennsylvania. Additionally, Benchmark/Hercules questions whether Keating/McCrae's minority partner is capable of performing 30% of the joint venture's portion of the project, as required by the solicitation.

The Contracting Officer's Statement

By letter dated July 24, the contracting officer filed his report on these protests. As to each protest, the contracting officer notes that the evaluation committee followed the requirements of PM 3.3.1, which requires that each party to a joint venture must affirmatively demonstrate its responsibility. Noting the solicitation's requirement that the joint venture perform some portion of the project work (at least 12%), and that the minority partner perform at least 30% of that amount,^{4/} the contracting officer asserts that neither Marroquin, the minority partner of Lobar/ Marroquin, nor Hercules, the minority partner of Benchmark/Hercules, "present[ed] the necessary experience to perform as a 30% joint venturer" and that each of these minority partners "lacked the capacity and ability to perform."

Specifically, as to Lobar/Marroquin's proposal, the contracting officer concludes that, while Lobar appeared satisfactory as majority partner, Marroquin did not provide evidence of the minimum construction experience required by the solicitation:

Marroquin indicated two projects for housing rehab for the City of Harrisburg, PA in the \$300,000 range. . . . This type project performance is not related to industrial or postal work. It was the opinion of the committee and the Contracting Officer that the joint venture of Lobar/Marroquin was not a responsible offeror. It is believed that based on references supplied by Marroquin that [it] did not possess the necessary experience or capability to perform. It did not demonstrate a good performance record on jobs comparable to the solicitation. In my judgment, it was not a responsible offeror.

As to Benchmark/Hercules' proposal, the contracting officer concludes that, while Benchmark presented satisfactory experience

^{4/} Lobar/Marroquin and Benchmark/Hercules each indicated in its proposal that the joint venture would perform twenty-five percent of the work with its own resources.

as majority partner, Hercules did not present sufficient experience or information to indicate its responsibility. The contracting officer found it significant that the current active projects listed by Hercules were not within the range contemplated by the solicitation and were not related to industrial or postal work. The contracting officer also notes that a reference check revealed Hercules' telephone was disconnected, and that a financial statement for Hercules was not submitted as required.

The contracting officer notes that the successful offeror, Keating/McCrae, indicated that its minority partner, McCrae, had completed "thirteen (13) projects of varied, complex nature and cost range from \$300,000 to \$1.8 million for institutional, industrial and commercial work." The contracting officer claims that Keating/McCrae was the lowest-priced responsible offeror, citing documentation contained in the evaluation committee's solicitation file, copies of which were forwarded to the protesters with the contracting officer's statement.

Further Comments of the Parties

Lobar/Marroquin filed comments on the contracting officer's re-port by letter dated August 3. It first questions whether the contracting officer followed PM 3.3.1 in developing responsibility criteria for use in Section M.1 of the solicitation, reiterating that "adequate comparable work experience" is not specified in the solicitation and is not mentioned in PM 3.3.1. Lobar/ Marroquin notes PM 3.3.1 c.'s requirement that any special standards of responsibility must be set forth in the solicitation and must apply to all offerors.

Lobar/Marroquin alleges that, contrary to the contracting officer's report, the Postal Service's debriefing official claimed that the solicitation required the minority joint venture partner to perform 30% of the entire project (approximately \$1.2 million), not 30% of the joint venture's portion (approximately \$300,000), and that the debriefing official declared that Marroquin was deemed nonresponsible because it did not have project experience in that larger amount. Lobar/Marroquin challenges the determination of McCrae's responsibility, noting Marroquin that its list of references contains no phone numbers, addresses, or contact per-sons, and includes projects that were completed more than two years ago, before McCrae was incorporated.^{5/} Lobar/Marroquin contends that these references should not have been considered in determining its responsibility because they were earlier than the solicitation allowed and related to a different entity. The pro-tester notes that the contracting officer also ignored Keating/ McCrae's incomplete financial statement (which did not include income statements for the past two years, as required by the solicitation) and its insufficient subcontracting plan (which listed the minority partner as one of the subcontractors) in making his responsibility determination.

^{5/} Lobar/Marroquin alleges that McCrae's principal was a partner with his father in a separate business enterprise prior to 1989. The contracting officer has not challenged this allegation.

Lobar/Marroquin also claims the evaluation committee could not have investigated its references fully; it refers to the reference letters included in its initial protest to demonstrate Marroquin's excellent background, of which the contracting officer would have learned if he had checked the references. The protester notes that the solicitation file indicates only one of Marroquin's references, the City of Harrisburg, was contacted by the evaluation committee, and this reference gave Marroquin a good rating. Referring to a May 29 memorandum to the file by the contracting officer, which questions Lobar/Marroquin's joint venture structure and "Davis-Bacon Act issues[.]" Lobar/Marroquin asserts that the solicitation file contains no evidence that the evaluation committee raised or investigated these concerns.^{1/} Finally, Lobar/Marroquin questions why, according to documentation in the solicitation file, its own references were not checked until the same day that Keating/McCrae was issued Notice of Intent to Award.

At Lobar/Marroquin's request, a conference was held on August 28. Following the conference, the protester filed further comments by letter dated September 4, in which it alleges that McCrae, the awardee's minority partner, does not appear to be doing any work at the project site.^{1/} Lobar/Marroquin also contends that, contrary to the contracting officer's assertion that award was made without discussions on the basis of initial proposals received, the solicitation file indicates that Keating/McCrae was given the opportunity to correct a serious deficiency in its minority contracting plan. The protester also reiterates some of its earlier arguments, and seeks to have Keating/McCrae's contract terminated and award made to it.

By letter dated September 14, the contracting officer responded to Lobar/Marroquin's post-conference comments. The contracting officer alleges that the protester failed to show that it was a responsible offeror at the time of award and takes issue with Lobar/Marroquin's version of the debriefing session, noting that the debriefers explained how the evaluation process worked and pointed out specific weaknesses in the offeror's proposal. The contracting officer concludes by asserting that the evaluators "made a good faith effort to select the lowest[-priced] responsible [offeror]. . . based on the information available to us at the time of award and within the time constraints upon us."

Lobar/Marroquin filed further comments on September 16, reasserting that there was

^{6/} An evaluation committee memorandum identifies Lobar/Marroquin's "questionable minority representation" and "Davis-Bacon Act issues" as specific deficiencies. However, the solicitation file neither explains these alleged deficiencies or their importance. The protester is correct that the file offers no supporting evidence for the evaluators' criticism in these areas.

^{7/} As this allegation relates to contract performance and administration, it is outside this office's protest jurisdiction. See C.R. Daniels, Inc., P.S. Protest No. 90-62, December 21, 1990; Ginny Baker, P.S. Protest No. 90-04, March 16, 1990.

no basis for the contracting officer's finding that Lobar/Marroquin was "not qualified." Lobar/Marroquin alleges that the record, including the solicitation file prepared by the evaluators, indicates that "Lobar/Marroquin was qualified, had a lower price and that Keating/McCrae did not comply with the stated requirements."

Benchmark/Hercules filed comments on the contracting officer's report on August 4.^{1/} It reasserts that "the contracting officer has impermissibly blurred the distinction between the factors properly considered for a determination of responsibility and the factors properly considered for an evaluation of award[.]" and that the evaluation committee made an improper "comparative" evaluation of each offeror's experience in determining responsibility. Benchmark/Hercules concludes:

The experience demonstrated on the proposal [of Benchmark/Hercules] was adequate to establish that the minority joint venture could perform 30% of the joint venture work. Previous projects were of adequate size, scope and complexity to demonstrate this capability. It is inconsistent with the social programs furthered by government procurement policies to require that a contractor have a previous project of exactly the same size or greater. To assume this position would prevent any minority business enterprise from growing as additional experience was gained.

Discussion

This office will undertake only a limited review of a contracting officer's technical evaluation of an offeror's responsibility. See Southern Air Transport, P.S. Protest No. 89-56, October 3, 1989. "The technical determinations of a contracting officer will not be overturned unless they are arbitrary, capricious, or otherwise unsupported by substantial evidence." Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990 (citing POVECO, Inc., et al., P.S. Protest No. 85-43, October 30, 1985). The protester bears the burden of overcoming the "presumption of correctness" accorded to the statements of contracting officers. Southern Air Transport, *supra*; Data Flow Corporation, P.S. Protest No. 83-54, October 28, 1983. Thus, we must determine if the protesters have met this substantial burden by showing that the contracting officer's determination of their nonresponsibility was not supported by substantial evidence.

The contracting officer's report to this office states that "[t]he current active projects

^{8/} Benchmark/Hercules mentions its FOIA request made to the contracting officer, and claims the contracting officer has never transmitted "the affirmative determination of responsibility required under Section 3.3.1 e.1 of the Manual." However, we note that the contracting officer's report indicates he forwarded to Benchmark/Hercules a copy of the solicitation file, which contains several internal postal memoranda discussing evaluation of proposals received and the various responsibility/nonresponsibility determinations made by the evaluation committee. These documents are sufficient to constitute the written determination of responsibility which PM 3.3.1 e.1. requires.

listed by Hercules were inadequate in the range contemplated by the solicitation" for it to be considered responsible. This is consistent with the rationale announced in the contracting officer's June 15 letter to Benchmark/ Hercules informing it of the award decision:

As the minority representative did not present adequate comparable work experience, the undersigned has determined that your joint venture proposal did not meet the requirements contained in the RFP.

While "adequate comparable experience" was not listed specifically as an affirmative responsibility criterion in the solicitation, the solicitation's request for "largest completed projects" and "current active projects" as responsibility factors in Section M. identifies these areas as necessary in establishing responsibility. The contracting officer determined that Hercules was nonresponsible by comparing the sizes of its various projects to the size of the project contemplated in the solicitation. Comparisons were not made between Hercules' experience and the experience of the other offerors, but between the size of projects performed by Hercules and the estimated size of the East York project. The protester indicated it would perform 25% of all work; since the solicitation requires the minority partner to perform at least 30% of this figure, the evaluators calculated the work to be performed by Hercules as approximately \$292,000, and compared Hercules' project experience against that amount. The solicitation file notes the project experience provided by Hercules: a \$300,000 project (for Hercules' president), a \$172,000 project, and five projects in the \$10,000 to \$60,000 range. Hercules listed one current project of \$18,000.

We cannot conclude that the contracting officer's determination that Hercules (and, therefore, Benchmark/Hercules) was nonresponsible on the basis of Hercules' experience was not supported by substantial evidence. The evaluators could reasonably conclude that Hercules did not possess enough experience with comparable projects to perform its portion of the contract.^{9/}

On the other hand, Lobar/Marroquin has more than met the burden imposed on the offeror who challenges a contracting officer's determination of nonresponsibility. Nothing in the contracting officer's report or the solicitation file appears to support the determination. While the contracting officer claims he rejected Lobar/Marroquin's proposal because of Marroquin's lack of "adequate comparable work experience," Marroquin listed at least two completed projects, and one current project, in the \$300,000 range, a figure entirely consistent with the amount of work Marroquin pledged to perform on the East York solicitation. The contracting officer alleges that Marroquin did not demonstrate a good performance record on comparable projects; the solicitation file memorandum states that Marroquin's reference checks were "inconclusive."

^{9/} We do not address the protester's arguments concerning the purpose of a minority joint venture program, as such policy analysis is beyond the scope of this office's protest jurisdiction.

However, these assertions are belied by other evidence. The record indicates the evaluators contacted only one of Marroquin's listed references, the City of Harrisburg, which gave Marroquin a good rating. Thus, the contracting officer's determination of Lobar/Marroquin's nonresponsibility is not supported by substantial evidence and appears unreasonable. See Automated Business Products, Inc., P.S. Protest No. 91-16, June 12, 1991 (nonresponsibility determination overturned because "none of the reasons advanced by the contracting officer to support his determination . . . are reasonable . . ."); cf. James E. Toney, P.S. Protest No. 88-45, October 6, 1988 (nonresponsibility determination unreasonable since it was based on overly restrictive requirements imposed on protester).

We also question the contracting officer's evaluation of the awardee's proposal relative to the other proposals received. Offerors are entitled to the same consistent application of evaluation criteria to their proposals and to all other proposals. Daniel J. Keating Construction Company, *supra*. "[U]nequal treatment among offerors is unacceptable because all offerors must be treated fairly and equally." CFI, P.S. Protest No. 88-82, February 17, 1989. In addition, PM 4.1.5 g.1. states that, when discussions are held with an offeror to provide "an opportunity to correct deficiencies, and . . . revise . . . proposals[.]. . . discussions must be held with all offerors in the competitive range."

Keating/McCrae's original proposal contained a critical shortcoming: its minority subcontracting plan did not meet solicitation requirements, and, in fact, listed McCrae as a proposed subcontractor, not as a minority joint venturer. The solicitation file indicates that the contracting officer gave the awardee several opportunities to change and correct this deficiency. The contracting officer transmitted a letter to Keating/McCrae explaining that its minority subcontracting plan was deficient because McCrae was named in it, and requiring Keating/McCrae to submit a revised plan before award could be made. The parties also exchanged several facsimile transmissions regarding Keating/McCrae's minority subcontracting plan before award. These contacts meet the PM's definition of discussions:

[a]ny oral or written communication between the Postal Service and an offeror (other than communications conducted for the purpose of clarification [of minor irregularities]) that is initiated by the Postal Service and (a) involves information essential for determining the acceptability of a proposal or (b) provides the offeror an opportunity to revise its proposal.

PM 4.1.5 a.3. Since discussions were held with Keating/McCrae, discussions should have been held with other offerors (such as Lobar/Marroquin) having a reasonable chance of being selected for award. See PM 4.1.5 g.1. The contracting officer did not provide Lobar/Marroquin, or other offerors, the opportunity to address such correctable deficiencies in their proposals. This disparate treatment was arbitrary and capricious. See Southern Air Transport, *supra*; POVECO, Inc., et al., *supra*.

Further, the contracting officer treated deficiencies in the pro-testers' proposals differently than he treated deficiencies in Keating/McCrae's proposal. Keating/McCrae's proposal contained other deficiencies in addition to its minority subcontracting plan. Contrary to the requirements of Section M, McCrae's list of projects omitted their dates, and the names, addresses, and telephone numbers of contact persons. Although the file indicates that despite these omissions, several of McCrae's references were contacted and provided good performance ratings, the evaluators' notes recognize that not all of McCrae's listed projects were completed within the last two years, as Section M.1 required. The contracting officer ignored this requirement, however, using all of the listed projects to justify the award.

These omissions warranted, at the very least, minimum contact by the contracting officer for clarification. See PM 4.1.5 f.2. ("Whenever there is uncertainty as to the pricing, technical, or other aspects of the most favorable initial proposal, award may not be made without discussions, unless the uncertainty can be resolved by clarification.").

Instead, the contracting officer apparently approved Keating/McCrae as responsible without even considering these deficiencies, in violation of PM 3.3.1 e.1. ("In the absence of information clearly showing that a prospective contractor meets applicable standards of responsibility, the contracting officer must make a written determination of nonresponsibility.").

The contracting officer criticizes Benchmark/Hercules for failing to submit a required financial statement, while overlooking deficiencies in the financial statement and joint venture agreement furnished by Keating/McCrae, and while permitting Keating/McCrae to correct its failure to submit an acceptable minority subcontracting plan. Additionally, the contracting officer points to Hercules' and Marroquin's lack of previous postal experience; this same weakness was not noted in evaluating McCrae's proposal. Such disparate treatment is unacceptable and impugns the integrity of the competitive procurement process. See POVECO, Inc., P.S. Protest No. 85-9, May 21, 1985 (contracting officer directed to rescind her rejection of protester's offered product and evaluate it "on an equal basis" with products of other offerors); CFI, supra (all offerors to be treated fairly and equally).

The record indicates the contracting officer did not act reasonably in evaluating proposals. However, we are bound by past decisions of this office in determining the type of relief that can be granted on these protests:

Since award has been made and performance begun, we are limited in the relief we can grant. When contract performance is underway, whether to require termination of the [improperly awarded] contract "depends on consideration of such factors as the seriousness of the procurement deficiency, the degree of prejudice to unsuccessful offerors or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the

cost to the Government, the urgency of the requirement, and the impact of termination on the accomplishment of the agency's mission." Inforex Corporation, P.S. Protest No. 78-12, June 26, 1978.

Cummins-Allison Corporation, P.S. Protest No. 91-18, June 4, 1991.

The prejudice to offerors and to the integrity of the competitive procurement system caused by the contracting officer's actions appears real and substantial. Other offerors were not evaluated in the same manner as the awardee, and the record indicates that the evaluators passed over one, and possibly two, lower-priced responsible offerors to award to Keating/McCrae. However, neither of the protesters has presented persuasive evidence of bad faith on the part of the contracting officer. We also note that more than 15% of contract performance has been accomplished by Keating/McCrae as of September 1; the contracting officer has estimated that 30% of the contract work is presently complete. Under such circumstances, while we disapprove of the contracting officer's actions in this matter, we cannot order termination of the current East York contract, as such a measure would not serve the best interests of the Postal Service.

The protest is sustained to the extent indicated.

For the General Counsel:

William J. Jones